No. 19-01

IN THE

Supreme Court of the United States

Spring Term, 2019

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MARY GULDOON,
Petitioner,
v.

STATE OF LACKAWANNA BOARD OF PAROLE,
Respondent.

_____

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

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BRIEF FOR THE PETITIONER, MRS. MARY GULDOON

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TEAM 16

QUESTION PRESENTED

1. Whether the registration requirements and special conditions of parole under Lackawanna's Registration of Sex Offenders Act (ROSA) violate Mrs. Guldoon's Constitutional rights under the First and Fourteenth Amendments.

2. Whether those same requirements and conditions of parole required by ROSA, when imposed on Mrs. Guldoon after her plea and sentencing violate the Ex Post Facto clause of the United States Constitution.

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Brief for the Petitioner

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STANDARD OF REVIEW

This case is on appeal from the Thirteenth Circuit Court of Appeals decision affirming the dismissal of Mrs. Guldoon's constitutional claims. This Court reviews questions of law *de novo*. *Ornelas v. United States*, 517 U.S. 690 (1996).

STATEMENT OF THE CASE

In 2008 Mary Guldoon became a teacher at Old Lackawanna High School, teaching Introductory and Advanced Computer Science. J.A. at 11. Shortly thereafter, in May 2010, Mrs. Mrs. Guldoon and her husband welcomed their first and only daughter to the world. J.A. at 12. However, there were complications. Mrs. Guldoon began suffering from severe post-partum depression following the birth of her daughter. Unwilling to allow this to keep her from her new

family, Mrs. Guldoon sought help and was prescribed Prozac as treatment. J.A. at 12. Unfortunately, the Prozac was ineffective, and Mrs. Guldoon returned to her position at Old Lackawanna High School still suffering from severe depression. J.A. at 12. That Fall, Mrs. Guldoon met a new student in her Introduction to Computer Science, B.B. Mrs. Guldoon began to aid B.B. first in her course, then in other courses he was struggling, and served as a supportive figure for B.B whose parents were abusing him and his siblings. J.A. at 12.

In October of 2010, Mrs. Guldoon and B.B began a physical relationship. J.A. at 5. Mrs. Guldoon was arrested, and to save B.B and her family the pain of trial, pled guilty to one count of rape in the third degree, one count of criminal sexual act in the third degree, and one count of sexual misconduct. During the investigation, text messages and emails between Mrs. Guldoon and B.B. were recovered. J.A. at 5. No evidence of sexual messages or social media communication of any kind was discovered. J.A. at 5-6.

Mrs. Guldoon was sentenced to a period of ten to twenty years' incarceration with the possibility of parole. J.A. at 13. At the time, the Board of Parole recommended that the court impose no special conditions of parole on Mrs. Guldoon. J.A. at 7.

While incarcerated, Mrs. Guldoon attended counseling as part of her rehabilitation. There, she was diagnosed with Bi-polar Disorder, a mental illness marked by recurring manic episodes that can cause inappropriate behavior, hypersexuality, excessive spending, and delusions. J.A. at 13. The psychiatrist determined that the Prozac Mrs. Guldoon was prescribed for her post-partum depression had unmasked her Bi-polar disorder and triggered the manic episode that resulted in her relationship with B.B. After this discovery, Mrs. Guldoon has been prescribed lithium and no further manic episodes have occurred. J.A. at 13.

After Mrs. Guldoon's sentencing and during her incarceration, the state of Lackawanna enacted Public Law 2016-1, Registration of Sex Offenders Act (ROSA). ROSA was approved in July of 2015 and became effective in January of 2016. J.A. at 19. ROSA was passed and established three distinct levels of registration for persons convicted of sex crimes. A level one offender is deemed a low risk of repeating their offense, level two is deemed moderate risk, and level three is deemed high risk. J.A. 38. Offenders classified as level two or three lose their driver's licenses, ability to access social media, and have their ability to move freely in the vicinity of schools restricted. J.A. 38. None of these new restrictions was listed on the suggested General Conditions of Parole that the Board of Parole submitted in Mrs. Guldoon's pre-sentence report. J.A. at 9.

Upon her release, the enactment of ROSA required Mrs. Guldoon to register as a level two sex offender. In contravention of the pre-sentence report, the Board of Parole applied ROSA's special conditions to Mrs. Guldoon to her detriment. The prohibition on accessing social networking sites prevented Mrs. Guldoon from effectively seeking employment. J.A. at 15. The loss of her driver's license also undermined Mrs. Guldoon's employment prospects as she is unable to reliably obtain transportation to interviews. J.A. at 15. The only job Mrs. Guldoon was able to find was the nightshift at Pleqinski's Pierogi Company. J.A. at 15. However, the only direct routes to her job include public roads which pass within 1000 feet of a school. Mrs. Guldoon is forced to ride a bike twenty-miles along State Highway 10. Because that road is unfit for bicycle travel, the special conditions imposed by ROSA puts her life and the lives of others at risk.

Mrs. Guldoon brought an action in the District Court for the Middle District of Lackawanna challenging the special conditions of parole as unconstitutional. The district court dismissed her claims and the Court of Appeals for the Thirteenth Circuit affirmed.

This Court granted Mrs. Guldoon's writ of certiorari on January 1, 2019.

SUMMARY OF THE ARGUMENT

The importance of social media in today's society cannot be ignored or overstated. Most American citizens rely on social media to interact with one another and engage in meaningful social and political dialogue. Complete bans on social media access cut individuals off from this central forum for exercising their First Amendment rights and effectively prevents them from exercising those rights at all. Because of this constitutional significance, bans are only permissible when they are reasonably necessary to protect the public. In the context of sex offenders, bans on social media access are appropriate where the offender has a history of using social media for illegal purposes or social media was involved in their crime. These bans are not appropriate in cases where the parolee has no history of inappropriate social media use, and social media was not involved in their crime. Barring Mrs. Guldoon from accessing social media is arbitrary and capricious because it deprives her of more liberty than is necessary to protect the public in light of her history and characteristics as well as the nature of her offense.

The loss of Mrs. Guldoon's driver's license in conjunction with the restriction on her ability to use public roads near schools has placed a large burden of her ability to travel freely for the purpose of employment and created a significant risk of harm to the public. This Court should formally recognize the existence of a constitutional right to travel freely on public roads within a single state arising from the substantive due process component of the Fourteenth Amendment.

This right is deeply rooted in our Nation's history as far back as Blackstone and the Articles of Confederation. Though the Court has not formally recognized the right, justices have alluded to its existence frequently. The ability to freely access public roads is implicit in the concept of ordered liberty. Without it, it would be impossible to exist in modern society or exercise fundamental rights, like the right to interstate travel. The special condition of parole preventing her from entering within 1000 feet of a school impermissibly burden Mrs. Guldoon's ability to travel on public roads because it involves a greater deprivation of liberty than is necessary. Tailoring the ban to prevent her from loitering near school property would still protect the public while allowing Mrs. Guldoon to safely commute to and from her job.

A punitive law that applies retroactively violates the ex post facto clause of the United States Constitution. ROSA is plainly a penal criminal statute because it amends the correctional, penal, and executive laws of Lackawanna and imposes affirmative restraints on the offenders that it covers. Mrs. Guldoon was sentenced prior to ROSA's passage and would not have been subject to these conditions if ROSA had not been passed in 2015. ROSA functions to deter future conduct as well as punish previous conduct, advancing the traditional goals of criminal punishment.

Even if this Court finds that ROSA is a civil regulatory statute, the conditions it imposes are so punitive in their purpose and effect that ROSA cannot be classified as civil. The conditions closely mirror historical public shaming and banishment sentences of early criminal penalties. ROSA affixes affirmative restraints and disabilities by restricting where and how Mrs. Guldoon may travel, how she may communicate with and take part in society, and her ability to raise her child. Further, the rational basis on which the legislature balances ROSA, concerns about recidivism of sex offenders, relies heavily on misleading statistics. There is ample support that sex offenders do not re-offend more than any other type of offender, and that the requirements of

registration and notification actually increase the recidivism rate of these parolees. Because there is no rational basis that the Lackawanna legislature may rely on, the imposition of ROSA's conditions are excessive in relation to addressing that concern. Thus, each of the factors that this Court has relied upon show that the effect of ROSA is so punitive that it cannot be classified as a civil regulatory scheme.

For these reasons, this Court should reverse the judgement of the United States Court of Appeals for the Thirteenth Circuit.

ARGUMENT

I. The Special Condition of Parole Limiting Guldoon's Access to Social Media Violates Her First Amendment Rights Because It Involves a Greater Deprivation of Liberty Than Is Necessary to Advance the Government's Objectives.

The special conditions of parole ban Guldoon from accessing any "commercial social networking website." J.A. at 46. The broad statutory definition of that term encompasses a wide variety of websites, including all forms of commonly used social media, such as Facebook and Twitter. See J.A. at 46. In the modern era, social media sites have increasingly been used as public forums where individuals share ideas and discuss socially and politically relevant issues. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). This Court has recognized the growing importance of social media to free and unfettered discussion in our society, finding that social media is "perhaps the most powerful mechanism . . . available to a private citizen to make his or her voice heard." *Id*. at 1737.

By barring Guldoon's access to social media, the Lackawanna Board of Parole has placed a massive burden on her First Amendment rights. *Id*. In the past, such broad restrictions on a parolee's rights have only been upheld where the potential danger to the public that would stem

from allowing the parolee to access these sites is so significant that it justifies stripping them of their ability to engage in meaningful public dialogue. *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006); *United States v. Rath*, 614 Fed. App'x 188 (5th Cir. 2015). Guldoon's case is distinguishable from these because there is no evidence she has ever used social media to as a tool to facilitate any type of illegal conduct or contact with minors. Because social media bears no relationship to the crimes of which she was convicted, banning her from accessing those sites deprives her of significantly more liberty than is necessary to further the state's interest in protecting the public and preventing recidivism.

A. A Ban on Accessing Social Media Websites Effectively Eliminates Guldoon's Ability to Exercise Her First Amendment Rights in Modern Society

At its core, the First Amendment protects a citizen's ability to engage in meaningful public discourse in order to develop informed opinions on the issues of the day and ultimately advocate for government policies which advance those opinions. *Carey v. Brown*, 447 U.S. 455 (1980). For most of the history of our republic, this vital discussion consisted of citizens speaking face to face on public land, such as parks, streets, or the town square. *See e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). As our technological abilities have progressed, both the forum and method of the public discourse has evolved. In today's internet-centric society, most public discussion has shifted to the virtual world and to social media sites in particular. *Packingham*, 137 S.Ct. 1735. Social media has become such a widespread method of communicating with one's fellow citizens that those who do not use social media to engage in political, social, or religious dialogue with their fellow man have become the outlier. *Id*. (noting that seven in ten American adults use a social networking service).

This widespread nature of social media allows individuals to exercise their First Amendment rights on an unprecedented scale. Social media enables individuals to disseminate their messages to much larger and more diverse audiences than they could ever hope to access without it. *Packingham*, 137 S. Ct. at 1737 (citing *Reno v. ACLU*, 521 U.S. 844 (1997)). Additionally, social media enables citizens to participate in the democratic process more effectively than ever before. Many, if not all, members of Congress have set up social media accounts that enable their constituents to engage with them directly and have their opinions heard. Twitter, *Members of Congress*, https://twitter.com/cspan/lists/members-of-congress/members?lang=en. The combination of these facts makes social media an incredibly effective tool for social and political activism. The Tea Party, which has emerged as a powerful faction in American politics, was first organized and mobilized through a variety of social media platforms. Douglas A. Blackmon, *Election 2010: Birth of a Movement – Tea Party Emerged from Conservatives Steeped in Crisis*., WALL STREET J., Oct. 29, 2010 at A1. The emergence of that movement enabled millions of like-minded Americans to band together use their collective influence to enact meaningful change. Without social media, such an undertaking would have been nearly impossible.

Two years ago, this Court unanimously recognized that the First Amendment provides strong protection to citizens' abilities to access social media due to its importance to freedom of speech as a whole. *Packingham v. North Carolina*, 127 S. Ct. 1730 (2017). Similar to the condition at issue in this case, *Packingham* concerned a North Carolina law which made it a crime for a registered sex offender to access any "commercial social networking website." *Id*. at 1733. North Carolina's law was identical to the special condition in the most relevant respect: it barred sex offenders from accessing commonly used social media sites like Facebook and Twitter. *Id*. at 1733,

1737. In striking the law down, the Court recognized the incredible breadth of the statute, noting that the prohibition was "unprecedented in the scope of First Amendment speech it burdens." *Id.* at 1737. Given this unprecedented burden on First Amendment freedoms, the state was unable to show that banning every sex offender from using social media, regardless of the nature of their crimes, was necessary to promote public safety. *Id*.

By imposing this condition on Guldoon, the Parole Board has prevented her from engaging in the legitimate exercise of her First Amendment rights almost completely. *See Id*. Lackawanna's ban is unprecedented in its scope. It sweeps more broadly than the ban invalidated in *Packingham* because it does not include an exception for direct communication services, like email. J.A. 45-46. The incredible breadth of this condition destroys Guldoon's ability to use the internet to communicate with anyone at all and, in doing so, strips her of her First Amendment rights and renders her a second-class citizen, unable to make her voice heard or hear the voices of others.

B. The Ban on Accessing Social Media is not Necessary to Further the State's Interest in Protecting the Public and Preventing Recidivism Because A Less Burdensome Restraint Would be Equally Effective.

Special conditions of parole which restrict a parolee's access to the internet have been upheld only insofar as they are reasonably necessary to protect the public from further offenses. A special condition is not reasonably necessary if a different, less burdensome restraint would be equally effective. *See United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002) (vacating a special condition banning internet access as unduly burdening defendant's liberty because a combination of monitoring and unannounced searches would achieve the same benefit to public safety). Whether a restraint is necessary turns on the history and characteristics of the parolee, *see United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006), as well as the nature and circumstances of their offense, *see United States v. Ullman*, 788 F.3d 1260 (10th Cir. 2015).

1. A Total Ban on Accessing Social Media is not Necessary in Guldoon's Case Because her History and Characteristics Show that Using Monitoring Software Would be Equally Effective at Protecting the Public and Preventing Recidivism.

Considering the advancements in computer filtering and monitoring technology, absolute bans on access to wide swaths of the internet are exceedingly blunt instruments when used to prevent a parolee from recidivating. Software is available which enables law enforcement to monitor what online content a parolee accesses, *see United States v. Lifshitz*, 369 F.3d 173, 191 (2d Cir. 2004) (conducting a "brief survey of methods of monitoring"). This software has become increasingly effective as technology has developed, leading more courts to vacate bans on internet access because the state could not show that monitoring programs would be less effective. *White*, 244 F.3d 1199; *United States v. Holm*, 326 F.3d 872 (7th Cir. 2003).

In light of these readily available, less burdensome alternatives, a sweeping ban on accessing large portions of the internet is necessary where the parolee has demonstrated both the technological ability to circumvent monitoring or filtering software and has shown that they are likely to reoffend if given the chance. In *United States v. Johnson*, 446 F.3d 272, the court imposed a special condition of parole barring Johnson from using the internet entirely following his conviction for sexual predation against minors he met online. Johnson appealed this condition, alleging that it involved a greater deprivation of liberty than was necessary because allowing him to access the internet subject to government monitoring would be sufficient to secure the government's interests. *Id.* The court's decision upholding the condition rested on two grounds.

First, Johnson was trained as an aerospace engineer and had access to specialized computer knowledge which could enable him to subvert any monitoring program the court put in place. *Id.* at 275, 282. Second, Johnson had shown a persistent unwillingness to participate in rehabilitation, or make any effort to reform his behavior, and he had repeatedly deceived health care providers and law enforcement alike regarding his use of the internet and his sexual activity. *Id.* at 282. The

presence of those factors indicated that Johnson was a high risk for reoffending. *Id.* The court emphasized the significant possibility that, if Johnson's internet access was simply monitored, he would circumvent the monitoring software and commit additional crimes. *Id.*

Conversely, if a parolee has specialized technical knowledge that could enable them to circumvent monitoring/filtering software, but they are not a significant risk to reoffend, an outright ban on accessing the internet is not necessary to promote public safety and prevent recidivism. The parolee in *United States v. Holm*, 326 F.3d 872, who was convicted of possessing child pornography, had worked for almost thirty years as an "information systems technologist" and possessed significant specialized knowledge regarding computers and information networks more broadly. Like the parolee in *Johnson*, this knowledge created a risk that Holm would be able to circumvent any restrictions on his internet use. Unlike Johnson, Holm did not exhibit any warning signs that indicated he was likely to attempt to actually put that knowledge to use if given the chance. This difference is crucial, and the court recognized that fact, vacating the outright ban and advising the district court to consider using filtering software to prevent Holm from accessing prohibited material. *Id.* at 879.

Comparing this case to *Johnson* and *Holm* reveals that an individual parolee's likelihood to reoffend in the absence of a ban is the key question when determining whether the ban is necessary to further the government's interests. The most important factors in deciding how likely a parolee is to reoffend is whether they have exhibited a lack of self-control, a tendency to deceive law enforcement, or an unwillingness to reform. These characteristics significantly increase the likelihood that a parolee will attempt to circumvent less restrictive conditions like monitoring software.

Guldoon's case squares much more easily with the facts in *Holm* than it does with *Johnson*. Guldoon possesses some specialized knowledge in the field of computing, J.A. at 13-14; however, there has been no indication that Guldoon would use that knowledge to circumvent monitoring software if it was placed on her computer. In stark contrast to the parolee in *Johnson*, she has shown a deep understanding of the harm she caused and a powerful willingness to engage in meaningful rehabilitation. J.A. at 11-14. She has also shown improved self-control. While serving her sentence, she was diagnosed with bi-polar disorder, a condition characterized by manic episodes that can cause serious deficiencies in self-control and lead to inappropriate behavior. J.A. at 13. Since being diagnosed and receiving treatment, Guldoon has not suffered any manic episodes or corresponding losses of self-control. J.A. at 13.

Guldoon's meaningful progress toward rehabilitation, her successful treatment, and her lack of any history of using social media to commit crimes indicate that there is an extremely low chance that allowing her to access social media while under the limitations of monitoring software would result in her reoffending or causing any harm to the public. Monitoring software is a significantly less severe deprivation of liberty as opposed to an outright ban, and it would be equally effective at advancing the state's interests of protecting the public and preventing recidivism. Therefore, barring Guldoon from accessing social media altogether deprives her of substantially more freedom than is necessary to secure the government's objectives. In her case, the imposition of such a wide sweeping ban is arbitrary and capricious when considered in light of her history and characteristics.

2. The Ban on Accessing Social Media is Arbitrary and Capricious because it Involves a Greater Deprivation of Liberty than is Reasonably Necessary in Light of the Nature and Circumstances of Her Offense.

Restrictions on a parolee's access to the internet are only appropriate insofar as they are tailored to the parolee's past offenses and designed to prevent recidivism and the public harm it

creates. Eleven circuits hold that restrictions on internet use are only necessary where the parolee has a history of using the internet to carry out their offenses and, even then it is only necessary to restrict a parolee's access to the types of websites or material that played a role in their offense. *See e.g., United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). The Sixth Circuit allows for the imposition more general bans where the probation officer retains some level of discretion to allow access to sites which do not create a risk of recidivism. *See United States v. Borders*, 489 Fed. Appx. 858 (6th Cir. 2012).

Bans on accessing social media altogether are necessary where social media was an instrumentality of the parolee's offense or they have a history of using social media to engage in illegal conduct. In *United States v. Holena*, 906 F.3d 288, the parolee's initial offense was using social media in an effort to solicit a minor to engage in sexual acts. The court commented that barring Holena from accessing social media sites like those he had used to commit the offense would almost certainly be appropriate. *Id.* at 293. The relevant variable when determining whether a total ban on accessing a certain area of the internet is necessary in light of the nature and circumstances of a parolee's offense is the degree of risk of recidivism that would be created by allowing them to access to that category of sites. An outright ban is only justified where that risk is significant.

The nature and circumstances of Guldoon's offense show that allowing her access to social media would not create a significant risk of recidivism. Guldoon initiated and developed her relationship with the minor B.B. almost exclusively through in person interactions. J.A. at 12. There is no evidence in the record that Guldoon ever used social media to contact B.B. or engage with him in any way. E-mail messages were recovered between the two parties, but there is no evidence that sexual communication of any kind took place via the internet. J.A. at 5-6. Guldoon's

conduct is fundamentally dissimilar with the sort of activity that renders a ban on social media necessary. At most, the record shows that Guldoon used an e-mail service to communicate with B.B. A ban on using email services could be necessary in light of that fact, but Lackawanna's broad condition prohibits much more. Given the breadth of this condition and the total lack of connection between its terms and Guldoon's conduct, its application to her case is arbitrary and capricious and violates her First Amendment rights.

II. The Special Condition Preventing Guldoon from Traveling within 1,000 Feet of a School Unconstitutionally Burdens her Fourteenth Amendment Right to Travel.

It is settled law that the Constitution protects a citizen's right to travel freely between the several states. *Shapiro v. Thompson*, 394 U.S. 618 (1969). Though this Court has not squarely addressed the question, several circuits have recognized an established right to travel freely within a state arising from the substantive due process portion of the Fourteenth Amendment. *Lutz v. York*, 899 F.2d 255 (3d Cir. 1990); *Cole v. Hous. Auth. of Newport*, 435 F.2d 807 (1st Cir. 1970); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648-49 (2d Cir. 1971); *Johnson v. City of Cincinnati*, 310 F.3d 484, 495, 502-05 (6th Cir. 2002). The rationale of those cases reflects an accurate understanding of the liberty secured by the Fourteenth Amendment and follows Supreme Court dicta which hints at the existence of a broad right to travel. *See Lutz*, 899 F.2d 255; *see also Williams v. Fears*, 179 U.S. 270, 274 (1900) ("the right to remove from one place to another according to inclination, is an attribute of liberty . . . secured by the 14th amendment."); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law"). As such, this Court should recognize that the Due Process Clause protects a constitutional right to travel freely through public spaces and roadways within a state.

Most states have recognized that bans on simply passing through areas around schools or parks impose a greater restriction on liberty than is necessary to protect the public and have narrowed their special conditions to allow parolees to pass near schools on public roads as long as they do not loiter. *See e.g., United States v. Bee,* 162 F.3d 1232 (9th Cir. 1998). Preventing Guldoon from using the public road adjacent to Old Cheektowaga Elementary School imposes a massive burden on her liberty and endangers her life. It is an arbitrary and capricious condition because simply preventing her from loitering within the same area would protect the public while also restricting Guldoon's liberty to a significantly lesser degree.

A. The Court Should Recognize the Right to Travel Intrastate Through Public Spaces Because that Freedom is Implicit in the Concept of Ordered Liberty and Deeply Rooted in Our Nation's History.

This Court has recognized a right arising under the substantive due process component of the Fourteenth Amendment, when that right, as narrowly defined, is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702 (1997).

The right implicated in this case can be narrowly defined as the right to travel locally through public spaces and roadways. *City of Cincinnati*, 410 F.3d 484. Blackstone first recognized a right to travel freely as being inherent in the common law, and later decisions of this Court recognized that the clause of the Articles of Confederation protecting free travel encompassed a broader right to "move at will from place to place" within a state. *United States v. Wheeler,* 254 U.S. 281 (1920); 1 WILLIAM BLACKSTONE, COMMENTARIES 130 (1765). Throughout our nation's history, members of this Court have acknowledged that a right to move freely is deeply rooted in our constitutional system. *See e.g., City of Chicago v. Morales,* 527 U.S. 41 (1999); *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972); *Williams v. Fears,* 179 U.S. 270 (1900).

In addition to this rich historical foundation, the right to move freely through public spaces and roadways is central to the concept of ordered liberty because it is essential for a free people to be able to function in their daily lives. Without a freedom to move within a state, a citizen would be prevented from seeking and obtaining employment and much of their ability to engage in cultural, social, and politically relevant activities would be severely compromised. *See Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (Douglas, J. concurring). The right to travel within a state is essential to citizen's abilities to exercise other protected rights, like the right to interstate travel. *King v. New Rochelle Mun. Hous. Auth.*¸ 442 F.2d 646 (2d Cir. 1971); *see Kent v. Dulles*, 357 U.S. 116 (1958). If a state could constitutionally ban citizens from moving freely within its boundaries, it could effectively eliminate its citizens' right to interstate travel. Because the right to travel between the states is essential to the concept of ordered liberty and the right to travel on the public streets within a state is essential to citizens' ability to exercise that right of interstate travel, it stands to reason that the right to travel on roads within one's own state is essential to the concept of ordered liberty as well.

B. The Special Condition Preventing Guldoon from Traveling on the Public Street Adjacent to Old Cheektowaga Elementary is Arbitrary and Capricious because it Involves a Greater Deprivation of Liberty than is Necessary.

The special condition banning Guldoon from entering onto school grounds makes no attempt to distinguish between simply passing through a public road that happens to be adjacent to a school and loitering near school grounds. This lack of considered tailoring imposes a massive burden on Guldoon by requiring her to travel to work via a circuitous and incredibly dangerous route. Preventing her from loitering on school grounds would serve the state's interest in protecting the public and preventing recidivism just as well as the current condition without imposing this burden.

Conditions preventing sex offenders from loitering near schools have been upheld because they are reasonably necessary to prevent the offender from having contact with minors. By remaining in a place where children congregate, the likelihood of interaction between the offender and a child is significant enough that it outweighs the burden placed on the parolee's right to travel. *See e.g.¸United States v. Bee*, 162 F.3d 1232 (9th Cir. 1998). The risk of potentially dangerous contact is not significant when the parolee is simply passing through on a public road adjacent to a school because they will not remain near the school for any length of time.

Guldoon wishes to use the public road adjacent to the school in order to access her place of employment in a manner that does not put her life at risk. By both requiring her to surrender her driver's license and preventing her from accessing the public roads between her and her workplace, the parole board has created circumstances that require Guldoon to travel forty miles each day on a two-lane state highway that is not suited for bicycle travel. J.A. at 16. Guldoon is frequently forced off the road by driver's who cannot see her in time to stop. *Id.* These conditions not only risk serious harm to Guldoon, but they also significantly endanger the welfare of the public by risking the lives of drivers as well. Imposing these conditions on Guldoon actually undermines the state's interest in protecting the public. Allowing an exception to these conditions that allows Guldoon to pass through roads adjacent to school grounds would eliminate the public safety risk her alternate route creates. Because she would still be banned from loitering near schools, the state's interest in protecting minors would not be undermined. As such, this condition involves a greater deprivation of liberty than is reasonably necessary to advance the state's interest and is therefore arbitrary and capricious.

III. ROSA violates the Ex Post Facto Clause because it inflicts greater punishment on Mary Guldoon than she would have been subject to prior to ROSA's passage.

The Registration of Sex Offenders Act (ROSA) as applied to Mary Guldoon violates the ex post facto clause of the United States Constitution because it, "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798).The dangers of ex post facto legislation were well known to the Founders and their prohibition of it could not be clearer. *See*, *Cal. Dept. of Corr. v. Morales*, 514 U.S. 499, 515 n.1 (1995) (Stevens J., dissenting). A law violates the ex post facto clause if it is both retrospective in its application and disadvantages the offender who is affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The defendant in *Weaver* was convicted and sentenced to fifteen years less time served in 1976. *Id.* at 25. At the time the defendant was sentenced the state of Florida permitted prisoners to receive credits for good behavior that would shorten the length of their sentences. *Id.* at 26. In 1978, the Florida legislature repealed the system in use at the time the defendant was sentenced and enacted a new formula that reduced a prisoner's sentence for good behavior. *Id.* In holding that the change in formulas violated the ex post facto clause this Court stated that, "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and government restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id.* at 30. Therefore, a law that imposes additional or greater punishment on an offender than they would have received under the law as it stood at the time of the offense violates the ex post facto clause.

This Court held in *Smith v. Doe*, 538 U.S. 84, 92 (2003) that evaluating a sex offender registration statute should entail a two-step inquiry. First, the court should determine whether the legislature meant for the statute to be punitive in nature or if it is merely a civil remedy . If it is punitive, the inquiry ends, and the law is invalid when applied as ex post facto. If, however,

the statute imposes a civil regulatory scheme that is non-punitive, then the court should next determine whether the regulations are so punitive in purpose or effect that they cannot properly be characterized as civil. *Id.*

A. The Intention of the Legislature in passing ROSA was to punish, thus violating the Ex Post Facto Clause.

While evaluating an ex post facto claim against special conditions of parole imposed by a sex offender registration statute, this Court has held that, "if the intention of the legislature was to impose punishment, that ends the inquiry." *Smith v. Doe*, 538 U.S. at 92. Determining whether a statute creates a civil or criminal proceeding "is first of all a question of statutory construction." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *Allen v. Illinois*, 478 U.S. 364, 368 (1986)). The facial language of the statute, the intent of the legislature, its relation to the objectives of criminal punishment, and the deterrent effect of a statute are all considerations for the court when evaluating whether it is civil or punitive. *Id.* at 361 – 363.

ROSA does not designate its conditions and findings as civil. The legislature states that the registration of sex offenders is, "an exercise of the state's police power regulating present and ongoing conduct." J.A. at 19. The utilization of "police power" by the legislature here recognizes that ROSA is utilizing the punitive power of the state to coerce its citizens into compliance. The mere fact that the legislature hides these burdensome conditions behind the term "regulatory" does nothing to diminish their punitive nature. Further, ROSA amends the correctional, penal and executive law of the code. The Lackawanna legislature chose to include major provisions of the act within criminal and executive statutes which, taken along with the invocation of the state's police power further show that the conditions of parole and restrictions are intended to be punitive.

Further, ROSA is a punitive statute because it furthers the primary objectives of criminal punishment by "affix(ing) culpability for prior criminal conduct "as retribution for those past acts *Kansas v. Hendricks*, 521 U.S. at 362. The special conditions of parole and are only applicable because Mrs. Guldoon was been convicted of a crime that the legislature decided to punish more heavily after her sentencing., Where a statute does not require a criminal conviction as a prerequisite for punishment, it indicates the statute is civil in nature because it "suggests that the State is not seeking retribution for a past misdeed." *Id.* Here, the Lackawanna legislature is seeking retribution for past misdeeds by affixing additional penalties after individuals have already been convicted and sentenced. The application of such punishments to Mrs. Guldoon plainly violates the ex post facto clause because she was sentenced prior to the passage of ROSA, a statute which the legislature used to attach additional, detrimental conditions to her sentence.

Finally, ROSA is intended to function as a deterrent. The legislative purpose of the act states that the recidivism of those convicted of sex offenses is one of the main evils that ROSA seeks to prevent. J.A. at 19. Further, the legislature announces that those convicted of certain crimes, "have a reduced expectation of privacy " and can therefore have their rights heavily restricted. J.A. at 19 – 23. The revocation of these rights and privileges is plainly meant to deter actions that the legislature feels may contribute to these offenders committing the same or similar offenses. ROSA advances the state's quintessentially punitive goals of deterrence and retribution while utilizing the police power of the state of Lackawanna and amending the correctional, penal and executive laws of the state to coerce those affected into compliance with the law. On its face, ROSA is plainly a punitive law and therefore its retroactive application to Mrs. Guldoon violates the ex post facto clause of the United States Constitution.

B. Even if ROSA is found to be civil, the regulations it imposes are so punitive in their purpose and effect that they cannot be established as civil regulations.

A law should be determined to be ex post facto by its effect, not by its form. *Weaver v. Graham*, 450 U.S. 24, 31 (1981). Even if ROSA is found to be a civil regulatory statute in its form, the regulations that it imposes are so punitive in their effect that they cannot be established as civil. *Smith v. Doe*, 538 U.S. 84, 92 (2003). Determining the punitive nature of a sanction involves an analysis of seven factors considered in relation to the face of the statute. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 – 169 (1963). This Court further narrowed the factors to consider in *Smith v. Doe* and determined that five factors are most relevant in determining whether a regulatory scheme is too punitive. 538 U.S. at 97. These factors are: whether it has historically been regarded as punishment, whether it imposes an affirmative disability or restraint, whether it promotes the traditional aims of punishment, has a rational connection to a non-punitive purpose, and whether the imposing regulation is excessive with respect to that non-punitive purpose. *Id.* No one factor is dispositive of whether or not a law is so punitive that it violates the ex post facto protections of the Constitution, but rather this Court has held that each relevant factor must be weighed to determine its effect. *Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000).

Historically, the requirement that sex offenders register closely resembles the public shaming punishments of early sentencing. The Court in *Smith v. Doe* was quick to discount the effectiveness of this factor with regard to registration requirements, but the law at issue in that case was solely considering registration. *Id*. ROSA requires much more than mere registration, which begin to approach more historical punishments such as banishment. Social media has increasingly become the public square in which thoughts and ideas are freely exchanged, and socially important issues are discussed. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Excluding citizens from this important social infrastructure is akin to banishment, leading to what Blackstone

termed, "a civil death." Sir William Blackstone, *Commentaries on the Laws of England in Four Books,* 118 (Philadelphia 1893). The notification and registry requirements of ROSA similarly attaches a badge of shame to offenders who are forced to register for decades after their offense. The California Supreme Court noted "although the stigma of a short jail sentence should eventually face, the ignominious badge carried by the convicted sex offender can remain for a lifetime." *In re Birch*, 515 P.2d 12, 17 (Cal. 1973). Eliminating Mrs. Guldoon's ability to access forums for political participation has constructively banished her from society and affixed to her a badge of shame that cannot be removed.

ROSA affirmatively places restraints upon those it affects by dictating where they may go, how they may travel, and what services they may take part in. Annual and repeating reporting requirements, and where registrants may live work and be all are direct restraints on personal conduct. *Does v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016). Further, the threat of punishment serves as its own form of restraint, since the fear of punishment can deter even some lawful conduct. *Id.* As applied to Mrs. Guldoon, these restrictions are especially burdensome. They force her to risk her life and the life of others to travel to work every night. Without a license and living in such a rural part of Lackawanna, Mrs. Guldoon and her family must constantly disrupt their lives to comply with this over-restrictive law. The fear of being imprisoned has led her family to sequester themselves away from the outside world by disconnecting their home from the internet. Mrs. Guldoon's efforts to comply with these restrictions has prevented her and her family from participating in society.

ROSA on its face is a punitive statute that is intended to punish past action and deter future actions. *See, supra* Part III, A. This factor is afforded "little weight" because civil laws can also have deterrent or retributive purposes. *Does v. Snyder*, 834 F.3d at 704. However, ROSA advances

these punitive purposes by restricting Mrs. Guldoon's ability to travel, find employment, parent her child, and engage in her chosen career. J.A. at 15 – 17. The punitive nature of ROSA's effect Mrs. Guldoon further supports that this law is punitive despite its potential "civil" labeling.

The next factor to consider is whether ROSA has a rational connection to a non-punitive purpose. *Smith v. Doe*, 538 U.S. at 97. The Lackawanna legislature, "finds that the danger of recidivism posed by sex offenders" is the threat that ROSA's passage is intended to address. J.A. at 19. This rationale mirrors the rationale of this Court in its holding in *Smith v. Doe.* "The risk of recidivism posed by sex offenders is frightening and high." 538 U.S. 84 (2003) (internal quotations omitted). This contention, that sex offenders are far more likely to commit additional offenses has largely been uncontested throughout each federal circuit. *See* Joshua E. Montgomery, *Fixing a Non-Existent Problem with an Ineffective Solution: Doe v. Snyder and Michigan's Punitive Sex Offender Registration and Notification Laws*, 51 Akron L. Rev. 537, 544 n.32 (2018). Every federal circuit has allowed sex offender registration systems to survive ex post facto challenges and relied, at least in part, on the state supporting their application based on the recidivism threat of sex offenders. However, the reliance on recidivism rate is inappropriate, as there has been no statistically significant showing that sex offenders re-commit offenses more than any other type of offender. *See* Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?* N.Y. TIMES, Mar. 6, 2017 , https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html?_r=1. This Court has stated that, "the rate of recidivism of untreated offenders has been estimated to be as high as 80%." *McKune v. Lile*, 536 U.S. 24, 33 (2002). However, there is little support for that statistic. The contention comes from a 1986 article published in *Psychology Today*, not a peer reviewed academic journal, that contains no supporting references or citations. Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake*

About Sex Crime Statistics, 30 Const. Comment. 495, 498 (2015). An empirical study conducted over the course of 25 years found that the sexual recidivism rate capped at 18.5%, comparable to the recidivism rate for other crimes. R. Karl Hanson *et. al*., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always A Sexual Offender*, 24 Psychol. Pub. Pol'y & L. 48, 53 (2018). Thus, the non-punitive purpose of public safety is grounded in an inappropriate citation to a non-peer reviewed article that grossly overstates the danger that offenders such as Mrs. Guldoon pose to society.

The respondents in this case may argue that even a recidivism rate of 18.5% is concerning enough that the Lackawanna legislature is well within their authority to require the special conditions and registration requirements imposed by ROSA. However, the final factor requires that the imposing regulations not be excessive in relation to that non-punitive purpose. A key question then is whether or not the registration and special conditions actually decrease the risk of recidivism by sexual offenders. Registration and notification laws may actually increase recidivism by imposing severe costs on those that are regulated. *See* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 J.L. & Econ. 161, 192 (2011). Failing to actually decrease the recidivism rate, imposing the special conditions of ROSA on offenders like Mrs. Guldoon is excessive in relation to the non-punitive goal that the Lackawanna legislature is attempting to address.

Each of the factors that this Court relied upon in *Smith v. Doe* indicate that ROSA violates the ex post facto clause.

Conclusion

For the foregoing reasons, this Court should overturn the decision of the Thirteenth Circuit Court of Appeals.